

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JEFFREY SMEJKAL and DEPARTMENT OF THE AIR FORCE,
NATIONAL GUARD BUREAU, Latham, NY

*Docket No. 98-2108; Submitted on the Record;
Issued March 9, 2000*

DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received an overpayment of compensation from September 30 through December 7, 1996 in the amount of \$5,673.50; (2) whether the Office properly determined that appellant was at fault in the creation of the overpayment; and (3) whether the Office properly required repayment at the rate of \$200.00 per month.

The Board has duly reviewed the case on appeal and finds that appellant received an overpayment of compensation in the amount of \$5,673.50.

Appellant, an aircraft mechanic, sustained burns in the performance of duty on June 20, 1996. Appellant stopped work on June 20, 1996 and received continuation of pay from June 21 to August 4, 1996. He submitted a claim for compensation on July 23, 1996 requesting wage-loss compensation from August 5 to August 17, 1996. Appellant completed additional claims for compensation covering the period August 18 to September 27, 1996. On September 30, 1996 the employing establishment completed a report of termination of disability and indicated that appellant returned to work on September 30, 1996. In a preliminary determination of overpayment dated November 7, 1997, the Office found that appellant had received an overpayment of compensation in the amount of \$5,673.50 as he returned to work on September 30, 1996 and received compensation benefits for total disability from September 30 through December 7, 1996. The Office stated that the benefit checks clearly outlined the dates of entitlement and that appellant was reasonably aware that he was not entitled to any payments received subsequent to his return to full-time duty on September 30, 1996. The Office allowed 30 days for a response. Appellant did not respond and by decision dated January 6, 1998, the Office finalized its preliminary determination finding that appellant accepted compensation

payments which he knew or should have known were not due him. The Office determined that appellant should pay \$200.00 per month to eliminate his overpayment debt.¹

The record establishes that appellant returned to work at the employing establishment on September 30, 1996. An Office computer printout establishes that the Office paid appellant compensation for total disability from September 30 through December 7, 1996. The Office properly determined that appellant received an overpayment of compensation in the amount of \$5,673.50.

The Board further finds that the Office's determination of fault must be set aside.

Section 8129(a) of the Federal Employees' Compensation Act² provides that, where an overpayment of compensation has been made "because of an error or fact of law," adjustment shall be made by decreasing later payments to which an individual is entitled. The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): "Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of the Act or would be against equity and good conscience."³ Accordingly, no waiver of an overpayment is possible if the claimant is with fault in helping to create the overpayment.

In determining whether an individual is with fault, section 10.320(b) of the Office's regulations⁴ provides in relevant part:

"An individual is with fault in the creation of an overpayment who:

- (1) Made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; or
- (2) Failed to furnish information which the individual knew or should have known to be material; or
- (3) With respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect."

In this case, the Office applied the third standard in determining that appellant was at fault in creating the overpayment. In order for the Office to establish that appellant was at fault

¹ Following the January 6, 1998 decision, appellant submitted additional new evidence to the Office. As the Office did not consider this evidence in reaching a final decision, the Board may not review it for the first time on appeal. 20 C.F.R. § 501.2(c).

² 5 U.S.C. §§ 8101-8193, 8129(a).

³ 5 U.S.C. § 8129(b).

⁴ 20 C.F.R. § 10.320(b).

in creating the overpayment of compensation, the Office must establish that, at the time appellant received the compensation check in question, he knew or should have known that the payment was incorrect.⁵

The Office determined that appellant was at fault in creating the overpayment as, “[b]enefit checks clearly outlined the period of entitlement. As such, it is considered that you were reasonably aware that you were not entitled to any payment received subsequent to your return to full duty on September 30, 1996.” However, the record does not contain copies of the checks in question. The Board has explained that where the record contains no evidence that the employee was apprised by the Office, as of the time he or she accepted compensation checks, of the specific periods the checks covered so as to put the employee on notice that he or she was being paid incorrectly for a period of time during which the employee worked, the employee cannot be found at fault in the creation of the resulting overpayment.⁶ In the present case, the Office failed to produce copies of the checks or other relevant payment records demonstrating notation of the dates covered by the checks that appellant improperly received and, therefore, it has not established that he knew or should have known he received improper payments of compensation. Therefore, appellant cannot be found to be at fault in the creation of the overpayment on that basis and the case must be remanded to the Office for consideration of waiver.

The Board additionally finds that it does not have jurisdiction over the method of recovery in this case.

With respect to recovery of an overpayment, the Board’s jurisdiction is limited to reviewing those cases where the Office seeks recovery from continuing compensation benefits under the Federal Employees’ Compensation Act. Where appellant is no longer receiving wage-loss compensation, the Board does not have jurisdiction with respect to the Office’s recovery of an overpayment under the Debt Collection Act.⁷

⁵ *Linda E. Padilla*, 45 ECAB 768, 772 (1994).

⁶ *Beverly E. Labbe*, 50 ECAB ____ (Docket No. 98-39, issued July 6, 1999).

⁷ *See Lewis George*, 45 ECAB 144, 154 (1993).

The decision of the Office of Workers' Compensation Programs dated January 6, 1998 is affirmed in regard to the amount of overpayment, set aside in regard to the finding of fault and remanded for development of the issue of waiver.

Dated, Washington, D.C.
March 9, 2000

David S. Gerson
Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member